

*a***GENESIS WORLD SDN BHD****v.****MOBIKOM SDN BHD***b*

HIGH COURT MALAYA, KUALA LUMPUR

VINCENT NG J

[CIVIL SUIT NO: D1-22-1764-2001]

19 MAY 2003

c

CIVIL PROCEDURE: Action - Filing of second suit - Whether filing of second suit an attempt to circumvent appeal process - Plea of limitation - Whether only available for an appeal against dismissal of first suit - Blatant disregard for exigency of time - Whether prejudicial to due administration of justice - Whether cogent reasons given to justify proceeding of second suit

d

CIVIL PROCEDURE: Striking out - Grounds for - Filing of second suit - Whether an abuse of process - Blatant disregard for exigency of time - Whether other party prejudiced - Failure to provide cogent reasons to proceed with second suit - Whether should be allowed to proceed - Plea of limitation - Whether available

e

CIVIL PROCEDURE: Limitation - Plea of limitation - Filing of second suit - Whether only available for an appeal against dismissal of first suit - Whether second action entitled to proceed because it was filed within limitation period

f

This was the defendant's appeal against the senior assistant registrar's decision dismissing the defendant's application to set aside the writ of summons and statement of claim. The facts were that the plaintiff's first suit was dismissed for want of prosecution. However, the plaintiff did not appeal against that order but instead chose to file another civil suit based on the same cause of action (the present suit). The defendant maintained that the plaintiff was estopped from filing this present suit against them as this was a delicate attempt to circumvent the essential appeal procedure, therefore amounting to a blatant abuse of court process. The plaintiff, on the other hand, argued that since the first suit was struck out, there was no decision on the merits of the matter. Further, having commenced the present suit within the limitation period, the plaintiff was thus entitled to proceed with the second action.

*h**i*

Held:

[1] By not appealing against the striking out of their first suit, the plaintiff was precluded from canvassing the argument that they were still within the six-year limitation period. The plaintiff should not be allowed to reagitate an issue (on limitation) which should only be available to them had they appealed against the dismissal of the first suit. Further, the plaintiff's disregard to the exigency of time had caused prejudice to the due administration of justice. The plaintiff had also failed to identify any cogent reason to justify being allowed to proceed with the present suit. (pp 106 h-i & 107 a-b, d)

[2] The plea of limitation has always been recognised as a wholly separate defence available to the defendant to be used as a shield. It was never designed as a sword in the hands of a plaintiff, and for the latter to assert that the second action should be allowed to proceed solely because it was filed within the limitation period, was tantamount to invoking a defendant's shield as a plaintiff's sword. (p 107 e-f)

[Defendant's appeal allowed with costs.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors, Chishty Coveney & Co v. Raja (TLR 29 December 1997) (**refd**)

Bailey v. Bailey & Anor [1983] 3 All ER 495 (**refd**)

Birkett v. James [1978] AC 297 (**refd**)

Choraria v. Sethia (TLR 29 January 1998) (**refd**)

Gilbert Engineering Co Inc v. Zainuddin Ahmad & Ors (No 2) [2003] 3 CLJ 39 HC (**refd**)

Janov v. Morris [1981] 3 All ER 78 (**refd**)

Lim Oh & Ors v. Allen & Gledhill [2001] 3 CLJ 233 FC (**refd**)

Othman Puteh & Anor v. Ku Azman Ku Bahari [2002] 7 CLJ 64 HC (**refd**)

Public Bank Bhd v. Heng Weng Chin & Ors [2002] 3 CLJ 751 HC CA (**refd**)

Transcom Rand (M) Sdn Bhd v. Mara Holdings Sdn Bhd [2002] 6 CLJ 492 HC (**refd**)

Trustees of Leong San Tong Khoo Kongsi (Pg) Registered v. Lee Boon Tin [1998] 4 CLJ 368 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 2 r. 3, O. 25

For the appellant/defendant - Joginder Singh (Peter Raj & Ramesh NP Chandran); M/s PI Raj & Co

For the respondent/plaintiff - CM Phang; M/s CM Phang & Co

Reported by Suhainah Wahiduddin

*a***JUDGMENT****Vincent Ng J:****Preamble***b*

Before me is the defendant's appeal (encl. 17) against the decision of the learned senior assistant registrar (SAR) on 6 September 2002, dismissing the defendant's application to set aside the writ of summons and statement of claim dated 8 October 2001.

Background Facts*c*

It is undisputed that the plaintiff's claim against the defendant was founded upon an agreement dated 28 February 1997; whereby the plaintiff was to be paid a registration subsidy of RM500 for each handphone issued to their members. The plaintiff sought to recover RM1 million.

d

The plaintiff had on 23 April 1999 caused to be issued a writ of summons based on the same cause of action *vide* Civil Suit No: D4-22-1156-99 (the first suit).

e

The defendant entered their appearance and filed their statement of defence to the first suit. The plaintiff then, for reasons best known to themselves, went into hibernation for exactly a year five months and 16 days before taking out the summons for directions (SFD) under O. 25 of the Rules of the High Court 1980 in the first suit.

f

The diligent defendant took immediate steps to set aside the SFD and to have the whole of the first suit dismissed for want of prosecution.

g

When their SFD and the defendant's application both came up for hearing, the plaintiff opted to withdraw the SFD and requested for an adjournment to file an application for abridgement of time to file their SFD.

Despite being given this respite, the recalcitrant plaintiff chose to disregard the court's peremptory order. As a result, when the defendant's application came up for hearing, not only was there no application for abridgement of time to file the SFD but there was no affidavit in reply by the plaintiff before the court.

h

This, however, did not stop the plaintiff from contesting the defendant's application, in the circumstances, considering the contumacious conduct of the plaintiff, the learned SAR allowed the defendant's application on 13 July 2001, effectively bringing the first suit to an abrupt but timely end (exh. 'KKL5' encl. 8).

i

This decision is of course in line with the judgment of our Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Pg) Registered v. Lee Boon Tin* [1998] 4 CLJ 368; wherein Mokhtar Sidin JCA held:

From our observation, it is clear to us that from the two cases there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v. James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases. As can be seen, the law in respect of case flow management in England will only be in operation in 1999 yet the courts there had already put in many aspects of its operation to use.

There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the Rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. **As such, we see no reason why we should not adopt the principles stated in these two decisions.** (emphasis added)

After having mulled over the problem of heavy backlog of civil cases that have hitherto plagued our courts, I have advocated the adoption, by our courts, of the concept of prejudice to the due administration of justice. In *Public Bank Bhd v. Heng Weng Chin & Ors* [2002] 3 CLJ 751, I had occasion to make the following observation:

In my view the new principles clearly established in satellite proceedings in England are applicable to cases such as the case at hand which also concern the non-observance of Court rules, a *fortiori*, when such rules are specially introduced in specific amendments for the designed purpose of countering stale or 'warehouse proceedings' or tardy or slothful parties. The other aspect of this issue which cannot escape a thinking mind is that, should the sole

- a* consideration for exercise of the Court's discretion be whether the breach of Court rules has occasioned prejudice to the opposing litigant – in complete disregard to prejudice to the due administration of justice – then we might as well do away with Court rules, since, with such approach Court rules become dead letter as soon as they are legislated into being. Yet, nevertheless, one cannot but be enamoured with – nay, treasure – the saving grace of the
- b* Court's discretionary powers bearing in mind the uncertainties of life consequential upon the way mortals arrange, or have their affairs arranged for them or have it unfortunately thrust upon them, there may occur real situations faced by a litigant or his counsel which makes it impossible or highly difficult to comply with a particular Court rule; hence, a robotic approach to Court rules should be frowned upon by the Courts. Now, with
- c* the palpable reversion to the era of true and tangible fairness in the administration of justice I am sure that henceforth our Courts at all levels would have to wrestle with the perennial problem of maintaining a feasible and practical balance between the need to enforce credible sanctions for blatant and flagrant contravention of Court Rules (as would be prevalent if such conduct is readily passed over by the Courts) and conscious regard to the
- d* abiding truism that the substantive merits of a case is where real justice resides.

- In my view the solution to this intractable problem could perhaps be found in the new approach taken by the English courts in the two Court of Appeal decisions in *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd and Others*, *Chishty Coveney and Co v. Raja* (TLR 29 December 1997 at 698) and *Choraria v. Sethia* (TLR 29 January 1998 at 43) which advocated the adoption of the novel concept of prejudice to the due administration of justice as a fresh ground for dismissal or striking out of an action or defence, should there be no prejudice to the opposing litigant, if the extent or nature of the breach
- e* of court rules is contumelious or serious. (Refer to my judgment in Guaman No. D1-22-556-96, *Transcom Rand (M) Sdn Bhd v. Mara Holdings Sdn Bhd and Omar bin Johar (3rd Party)* for further discussions on this topic.)
- f*

- This new concept clearly stem from the obvious truism that since the court's time is limited and finite, parties who hog or monopolise judicial time through contumelious or contumacious or vexatious or slothful or tardy conduct deprive other litigants from their fair share of the Court's time. Further, with the escalating backlog of cases there must be a determined effort on the part of Judges to see the end of litigation as a tactical weapon – truly, a common phenomenon in the commercial Courts. It was clearly with the sole intention of ensuring the due and expeditious administration of justice that O. 32
- g* r. 13(2) of the Rules was introduced by the Rules Committee – surely, it cannot be an exercise in vain. Thus, in order to override considerations of prejudice to the due and expeditious administration of justice, the Court in the exercise of its discretion to extend time has essentially to consider whether the cogency and gravity of the applicant's reasons for the delay is co-extensive
- h*
- i*

with the length of the delay for which the extension is sought, even if such delay has caused no prejudice to the other party. It is now settled that the rules of Court must *prima facie* be obeyed, with adverse consequences if not obeyed. This principle was clearly and authoritatively laid down in a clear language by the Privy Council in *Ratnam v. Cumarasamy & Anor* [1964] 3 All ER 933 by Lord Guest in the following terms (at page 935):

The rules of court must, *prima facie*, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged, and that his reason for this delay was that he hoped for a compromise. Their lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material on which they could exercise their discretion in favour of the appellant.

The above principles in *Ratnam* were consistently followed in our Courts – in *Ong Guan Teck & Ors v. Hijjas* [1982] 1 MLJ 105, *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399, *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 MLJ 41 and *Cheah Teong Tat v. Ho Gee Seng & Ors* [1974] 1 MLJ 31.

The opinion expressed above was a sequel to the approach that was advocated by me for adoption by the courts, in *Transcom Rand (M) Sdn Bhd v. Mara Holdings Sdn Bhd* [2002] 6 CLJ 492 (Transcom Rand), Also, in *Gilbert Engineering Co., Inc. v. Zainuddin Ahmad & Ors (No 2)* [2003] 3 CLJ 39, I reiterated similar views I expressed in *Othman Puteh & Anor v. Ku Azman Ku Bahari* [2002] 7 CLJ 64 in the following language (at p. 67):

I am conscious of the approach that I should take in a preliminary objection on matters of form or procedure. Such preliminary objections should not normally be held to prevail over the merits of the case unless there is blatant infringement of the rules and **such infringement has occasioned prejudice** to the adverse party or **to the due administration of justice** ... if the infringement is significant and the culpability is of a high degree, the court cannot overlook such conduct without also condoning it and thereby encouraging non-observance and total disregard of clearly expressed rules in general which are meant to be observed (emphasis added).

- a* Indeed, as one of the measures to help clear the backlog of cases, I would suggest that the Rules Committee re-amend O. 1A and O. 2 r. 3 of the Rules of the High Court 1980 to incorporate express recognition to the consideration of the concept of prejudice to the due administration of justice in civil cases. (See *Birkett v. James* [1978] AC 297, *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors*, *Chishty Coveney & Co v. Raja* (TLR 29 December 1997) (*Arbuthnot*), *Choraria v. Sethia* (TLR 29 January 1998).)

- b* It is noteworthy that the plaintiff did not appeal against that order but instead chose to file another civil suit based on the same cause of action about two and a half months later (the present suit). I would hold such conduct to be clearly contumelious.

The Appeal

- c* The defendant maintained that the plaintiff was estopped from filing this present suit against them as this was a deliberate attempt to circumvent the essential appeal process and therefore amounted to a blatant abuse of court process.

d I am totally *ad idem* with the views expressed by Steve Shim CJ Sabah & Sarawak in *Lim Oh & Ors v. Allen & Gledhill* [2001] 3 CLJ 233 at p. 240:

- e* Given the view which we take that there was clearly in existence a peremptory order of the court and that the learned Senior Assistant Registrar had struck out the appellants' first suit for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and the reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

f (See *Janov v. Morris* [1981] 3 All ER 78 and *Bailey v. Bailey & Anor* [1983] 3 All ER 495.)

This view seems tailor made for the present appeal.

- g* The plaintiff, on the other hand, argued that as the first suit was struck out for want of prosecution, there was no decision on the merits of the matter. Having commenced the present suit within the limitation period, the plaintiff was entitled to proceed with the second action.

- h* I find that the plaintiff's failure to appeal against the striking out of their first suit constituted a concession that the decision of the learned SAR was correct. By not appealing, the plaintiff are now, in fact, precluded from canvassing the argument that they were still within the six-year limitation period. The plaintiff should not be allowed to reagitate an issue (on limitation) which may only be

i

available to them had they appealed against the dismissal of the first suit for want of prosecution. Should this court hold the converse view it would only encourage litigants to ignore the Rules of the High Court and act with impunity so long as the limitation period has yet to run its full course. I am mindful that in practice the courts are averse to dismissing a suit for want of prosecution where the limitation period has not expired. However, where a plaintiff has opted not to appeal but instead file a fresh action, what becomes relevant in the fresh action is whether he has given some cogent reason why the second action should be allowed to proceed.

In *Transcom Rand*, after a discussion of Lord Woolf's *dicta* in *Arbuthnot*, I made a list of the notable features of his speech and this included:

...

- (vi) Indeed, if an action has been dismissed for abuse of process some special reason has to be identified to justify a second action being allowed to proceed. (emphasis added).

The plaintiff's disregard to the exigency of time has caused prejudice to the due administration of justice and they have failed to identify any cogent reason to justify being allowed to proceed with the present suit.

Lastly, it must be borne in mind that the plea of limitation has always been recognised as a wholly separate defence available to the defendant to be used as a shield. It was never designed as a sword in the hands of a plaintiff, and for the latter to assert that the second action should be allowed to proceed solely because it was filed within the limitation period is tantamount to invoking a defendant's shield as a plaintiff's sword.

Conclusion

After careful consideration of the pleadings, the affidavits and the submissions put in by both sides, I was satisfied that the defendant's appeal in encl. 17 should be allowed with costs, and so it was.